Filed 12/15/16 In re A.F. CA2/1

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re A.F., a Person Coming Under the Juvenile Court Law.	B271371
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. EDWIN F., Defendant and Appellant.	(Los Angeles County Super. Ct. No. DK15746)

APPEAL from an order of the Superior Court of Los Angeles County, Philip Soto, Judge. Reversed in part and affirmed in part.

Jesse McGowan, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, R. Keith Davis, Assistant County Counsel, and Sarah Vesecky, Deputy County Counsel, for Plaintiff and Respondent.

Edwin F. (father) appeals from the portion of a dependency jurisdictional order finding that because he sent two minor girls videos of himself masturbating, his infant son, A.F., was at substantial risk of being sexually molested. We conclude insufficient evidence supports the finding. Father also contends the juvenile court erred in removing A.F. from his custody. We disagree. We therefore reverse in part and affirm in part.

BACKGROUND

The family comprises father, P.H. (mother), and A.F., born in December 2014. On numerous occasions in 2014 and 2015, father "FaceTimed" mother's female relatives, including a 13-year-old sister and a 14-year-old cousin, sending them images and videos of himself masturbating.[1] After the sister's mother filed a police report, father was arrested and charged with sending harmful matter to a minor in violation of Penal Code section 288.2, subdivision (a).

When a social worker with the Department of Children and Family Services (DCFS or the department) interviewed the parents at their home, they refused to permit her to enter the home and laughed at her when she asked father to restrain his pit bull. Mother disbelieved the allegations and father denied them but admitted to a long criminal history and to using

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[1] FaceTime, Apple's video-calling technology, allows calls between iPhones, iPods, iPads, and Mac computers.

methamphetamine off and on outside the home, as recently as January 15, 2016.

The social worker verified the allegations with police but was unable to do so with mother's family because they refused to talk to her. The next day, father tested negative for drugs. On February 1, 2016, A.F. was given a medical exam that neither confirmed nor disconfirmed sexual abuse. On February 19, 2016, the social worker, attended by police, served a removal warrant on the family and took A.F. into protective custody and placed him with a foster parent. Father immediately moved out of the house.

On February 24, 2016, DCFS filed a petition pursuant to Welfare and Institutions Code section 300, alleging A.F. was put at risk by father's sending sexually explicit material to mother's family members, including a 13-year-old sister and 14-year-old cousin, by his admitted drug use, and by mother's failure to protect the child from father.[2]

The department interviewed several individuals in preparation for the jurisdiction hearing. Mother reported she had no evidence one way or another whether father sent sexually explicit videos to her relatives, as none of them would tell her, including the 13-year-old sister. She also had no information that father used drugs, because if he did, he would not tell her. Father denied the sexual abuse allegations but admitted he used drugs. Mother's relatives disclosed that father had been sending explicit images and videos of himself to mother's sisters, aunts and cousins for years. Mother's brother stated, "It started 3

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[2] Undesignated statutory references will be to the Welfare and Institutions Code.

years back. He first started with other family members, like my other sisters, aunts, and other nieces. We got tired of it, we would always call the cops and they didn't do anything. [¶] . . . He was FaceTiming my little sister like 30 times, we got very upset and decided to take action. We didn't want the baby [A.F.] to be taken away. We just don't want the guy to be molesting my little sister." Mother's relatives reported that father's relatives, including mother, were in denial about father's activities.

DCFS reported mother was cooperative and had begun participating in the proposed case plan and A.F. was developing age appropriately. Mother stated she was "willing to do whatever it takes" to get A.F. back, and father said, "I'm not sure what I need but whatever you want me to do I'll do it, I just want my son out of foster care."

At the combined jurisdiction/disposition hearing, the juvenile court found father's behavior indicated a desire to dominate mother's female relatives and created a "zone of danger" into which A.F. would fall if returned to a home where father resided. The court found mother and father could not be trusted to deal with the problem. The court sustained the petition as pled, declared A.F. a dependent of the court, and ordered him removed from father and released to mother on the condition that father not live in the house. Father appealed.

DISCUSSION

I. No Evidence Suggested A.F. Was at Substantial Risk of Sexual Abuse

Father argues no reasonable trier of fact could find that one-year-old A.F. was exposed to a substantial risk of sexual abuse.

Preliminarily, DCFS argues we need not entertain father's contention because the juvenile court correctly assumed jurisdiction based on other sustained allegations. Father argues we should nevertheless address the finding as to him because it may inhibit reunification and prejudice him in future proceedings in this case.

An appellate court's jurisdiction extends only to actual controversies for which it can grant relief. (*In re Christina A.* (2001) 91 Cal.App.4th 1153, 1158; *In re Jessica K.* (2000) 79 Cal.App.4th 1313, 1315-1316.) "'When a dependency petition alleges multiple grounds for its assertion that a minor comes within the dependency court's jurisdiction, a reviewing court can affirm the juvenile court's finding of jurisdiction over the minor if any one of the statutory bases for jurisdiction that are enumerated in the petition is supported by substantial evidence. In such a case, the reviewing court need not consider whether any or all of the other alleged statutory grounds for jurisdiction are supported by the evidence.'" (*In re I.J.* (2013) 56 Cal.4th 766, 773-774.) "The question of mootness must be decided on a case-by-case basis. [Citation.] An issue is not moot if the purported error infects the outcome of subsequent proceedings." (*In re Dylan T.* (1998) 65 Cal.App.4th 765, 769.)

Father's fear that the sexual abuse finding will affect him in the ultimate disposition of this case is well taken. DCFS routinely cites prior dependency findings in later reports, giving some weight to father's claim that the sexual abuse finding could have a future impact. We will therefore entertain his appeal. (*In re D.P.* (2014) 225 Cal.App.4th 898, 902; *In re Drake M.* (2012) 211 Cal.App.4th 754, 762-763.)

A child may be adjudged a dependent child of the court if the "child has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness, as a result of the failure or inability of his or her parent . . . to adequately supervise or protect the child," or the "child has been sexually abused, or there is a substantial risk that the child will be sexually abused, as defined in Section 11165.1 of the Penal Code, by his or her parent." (§ 300, subds. (b) & (d).) The department has the burden of proving by a preponderance of the evidence that A.F. is a dependent of the court under section 300. (§ 355, subd. (a).)

Our review is for substantial evidence. (*In re I.J.*, *supra*, 56 Cal.4th at p. 773.) "'In reviewing a challenge to the sufficiency of the evidence supporting the jurisdictional findings and disposition, we determine if substantial evidence, contradicted or uncontradicted, supports them. "In making this determination, we draw all reasonable inferences from the evidence to support the findings and orders of the dependency court; we review the record in the light most favorable to the court's determinations; and we note that issues of fact and credibility are the province of the trial court." [Citation.] "We do not reweigh the evidence or exercise independent judgment, but merely determine if there are sufficient facts to support the findings of the trial court. [Citations.] "'[T]he [appellate] court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence . . . such that a reasonable trier of fact could find [that the order is appropriate].'" [Citation.]" [Citation.]'" (*Ibid.*)

No evidence suggests that father sexually abused A.F. or that the child was in any way neglected by either parent. "But

section 300 does not require that a child actually be abused or neglected before the juvenile court can assume jurisdiction. The subdivisions at issue here require only a 'substantial risk' that the child will be abused or neglected. The legislatively declared purpose of these provisions 'is to provide maximum safety and protection for children who are currently being physically, sexually, or emotionally abused, being neglected, or being exploited, and to ensure the safety, protection, and physical and emotional well-being of children *who are at risk of that harm*.' [Citation.] 'The court need not wait until a child is seriously abused or injured to assume jurisdiction and take the steps necessary to protect the child.'" (*In re I.J.*, *supra*, 56 Cal.4th at p. 773.)

Here, the evidence showed only that father molested mother's female relatives, including two minors, by sending them sexually explicit images and videos. Aberrant as his conduct was, we conclude it does not constitute evidence that father's infant son is at "substantial risk" of sexual abuse.

DCFS does not argue the evidence suggests that father would sexually abuse A.F. directly; it argues he might negligently expose A.F. to lewd conduct because it is foreseeable that in the future he would engage in the conduct when the child is present. DCFS argues there is "no reason to believe father would, or could, refrain from engaging in his abusive conduct in A.F.'s presence." We disagree. Although mother's relatives described dozens of incidents going back three years, none indicated A.F. or any other child was present with father during any of them. The test under section 300 is not only whether there is risk, but whether the risk is substantial. No reasonable fact finder could infer—on no evidence—a substantial risk exists that father would deliberately

or negligently involve A.F. in future misconduct. It can always be argued that a parent's misconduct might recur in a child's presence. But to ground a jurisdictional finding on that possibility would remove any standard of causation relating to parental misconduct and read the word "substantial" out of section 300.

II. The Juvenile Court Was Authorized to Order A.F. Removed from Father

"After the juvenile court has assumed jurisdiction under section 355 by finding the child is a person described by section 300, the court is required to hear evidence on the question of the proper disposition to be made of the child. (§ 358, subd. (a).) At the disposition hearing the court may enter an order ranging from dismissal of the petition [citations] to declaring dependency, removing physical custody from the parents and making a general placement order for the child [citations]." (*In re Summer H.* (2006) 139 Cal.App.4th 1315, 1324.)

Here, the juvenile court ordered both that father be removed from the home and that A.F. be removed from his custody. Father does not challenge the sufficiency of evidence supporting the order but argues the court was statutorily unauthorized to order A.F. removed from his custody if he (father) was already ordered not to reside in the home.

Subdivision (c)(1) of section 361 provides that no child may be taken from the physical custody of the parents with whom the child resides unless the juvenile court finds by clear and convincing evidence that there is or would be a substantial danger to the physical safety or emotional well-being of the child if returned home and no reasonable means exist by which the child's safety can be protected without removing the child. (§

361, subd. (c)(1); *In re V.F.* (2007) 157 Cal.App.4th 962, 969, fn. 5.) In determining whether reasonable means to prevent removal are available, the juvenile court shall consider the "option of removing an offending parent or guardian from the home" and the option of "[a]llowing a nonoffending parent or guardian to retain physical custody as long as that parent or guardian presents a plan acceptable to the court demonstrating that he or she will be able to protect the child from future harm." (§ 361, subd. (c)(1)(A) & (B).)[3]

Nothing about section 361 prevents a juvenile court from ordering both that an offending parent be removed from the home and that a dependent child be removed from that parent's custody.

Father argues that by the plain language of section 361, subdivision (c)(1), a juvenile court's acceptance of a nonoffending

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[3] Subdivision (c)(1) of section 361 provides, in pertinent part: "A dependent child shall not be taken from the physical custody of his or her parents . . . with whom the child resides at the time the petition was initiated, unless the juvenile court finds clear and convincing evidence . . . [that] [¶] (1) There is or would be a substantial danger to the physical health, safety, protection, or physical or emotional well-being of the minor if the minor were returned home, and there are no reasonable means by which the minor's physical health can be protected without removing the minor from the minor's parent's or guardian's physical custody. . . . The court shall consider, as a reasonable means to protect the minor, each of the following: [¶] (A) The option of removing an offending parent or guardian from the home. [¶] (B) Allowing a nonoffending parent or guardian to retain physical custody as long as that parent or guardian presents a plan acceptable to the court demonstrating that he or she will be able to protect the child from future harm."

parent's safety plan necessarily means that reasonable means are available to protect the child without removing the child from the offending parent's custody. We disagree with father's statutory interpretation.

Section 361 obligates the court to consider whether removing an offending parent from a household that has an acceptable safety plan in place suffices to protect the minor and thus precludes removal from the offending parent's custody. But nothing obligates the court to find that this measure suffices as a matter of law. In other words, an "acceptable" safety plan does not preclude a finding that substantial danger to the child exists even with the plan in place.

Section 361 "does not, by its terms, preclude the possibility of ordering both removal of the parent from the home and removal of the child from the parent. [¶] Flexibility in ordering removal from only one custodial parent makes sense in light of the many different custody arrangements that a juvenile court might need to address. For example, two parents might live apart and share custody of a child. Or the parents might live together with a child most of the time, but one of the parents maintains a separate residence that the child sometimes visits. In such situations, if only one parent engages in the conduct underlying a dependency petition, the juvenile court might conclude that it is appropriate to remove the child only from the offending parent and allow the child to remain in the other parent's custody." (*In re Michael S.* (2016) 3 Cal.App.5th 977, 984-985.)

DISPOSITION

The juvenile court's jurisdictional order is reversed to the extent it finds A.F. is at substantial risk of sexual abuse. Otherwise, the court's orders are affirmed.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

ROTHSCHILD, P. J.

LUI, J.